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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87779; File No. SR-NYSEAMER-2019-57]

### **Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change to Amend the NYSE American Options Fee Schedule relating to the MM FAANG Credit**

December 17, 2019

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 9, 2019, NYSE American LLC (“NYSE American” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend the NYSE American Options Fee Schedule (“Fee Schedule”) relating to the MM FAANG Credit. The Exchange proposes to implement the fee change effective December 9, 2019. The proposed change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to modify an incentive program (described below), which is designed to encourage Market Makers to provide more competitive prices and deeper liquidity in options on the NYSE FANG+ Index ("NYSE FANG+"), which trades under the symbol FAANG. FAANG is an acronym for the market's five most popular and best-performing tech stocks, namely Facebook, Apple, Amazon, Netflix and Alphabet's Google.

Currently, the Exchange offers a \$5,000 credit to Market Maker organizations -- specifically, NYSE American Options Market Maker, Specialist, e-Specialist or Directed Order Market Makers -- that execute at least 500 total monthly contract sides that open a position in FAANG on the Exchange (the "MM FAANG Credit" or "Credit"). The Credit, which is applied against all Exchange fees charged to a Market Maker, is currently capped at \$50,000, so if more than ten Market Maker organizations qualify for a MM FAANG Credit in a calendar month, the MM FAANG Credit for each qualifying firm will be a pro rata share of \$50,000.<sup>3</sup>

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<sup>3</sup> See Fee Schedule, Section I.A., Options Transaction Fees and Credits, Rates for Options Transactions, note 7 (Options on NYSE FANG+ Index ("FAANG") transactions),

The Exchange proposes to continue to provide \$50,000 in Credits to encourage Market Maker organizations to provide liquidity in FAANG, but provide for two different qualifying levels with different monthly credits. As proposed, the Exchange proposes to add an alternative, higher monthly credit of \$10,000 for Market Maker Organizations that execute at least 2,000 total monthly contract sides that open a position in FAANG on the Exchange. This credit would be capped at \$25,000. Accordingly, if more than two firms qualify, they must share \$25,000 pro rata. The Exchange also proposes to reduce the total credits available for firms that qualify for the current Credit from \$50,000 to \$25,000, and similarly reduce the fewest number of qualifying firms that would be entitled to the full Credit from eleven to six. The Exchange believes that the proposed change would incent firms that have historically qualified for the Credit to trade greater volume to earn the higher (proposed) Credit. And, believes that the lower (existing) volume threshold should still attract firms (including those that have never achieved the Credit) to trade the requisite volume in FAANG to earn the Credit.

The Exchange proposes to implement the fee change effective December 9, 2019.

#### Background

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been

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available here: [https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE\\_American\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf).

remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>4</sup>

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>5</sup> Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in the first quarter of 2019, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>6</sup>

With respect to FAANG, this index is listed and traded only on the Exchange and NYSE Arca, Inc. (“NYSE Arca”). However, this index product competes with market participants that choose to create their own synthetic index product by trading in the basket of securities that comprise the FAANG index. This proposed fee change is designed to increase liquidity for market participants that would like to trade FAANG by encouraging Market Maker organizations to open more positions in FAANG on the Exchange.

#### Proposed Fee Change

The Exchange proposes to modify the existing Credit and add an alternative that offers a higher credit for firms that execute a higher number of total monthly contract sides that open a position in FAANG on the Exchange, as set forth in more detail below. With this proposed

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<sup>4</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

<sup>5</sup> The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: <https://www.theocc.com/market-data/volume/default.jsp>.

<sup>6</sup> Based on OCC data, see id., the Exchange’s market share in equity-based options declined from 9.82% for the month of January to 7.86% for the month of September.

change, the total amount available under the Credit would not be changing. Rather, the Exchange would make available a higher per-firm credit for firms that provide more liquidity in FAANG. The Exchange believes the proposed modifications would further the Exchange's goal of encouraging Market Makers to make a market in these (relatively) new products, which would in turn, benefit market participants that are interested in trading FAANG.

To effect this change, the Exchange proposes to modify the Credit to reduce the cap on the credits available for the existing qualification from \$50,000 to \$25,000. With this change, if more than five (as opposed to more than ten) firms execute at least 500 total monthly FAANG contract sides in a calendar month, the Credit for each qualifying firm would be a pro rata share of \$25,000 (down from \$50,000).<sup>7</sup> The Exchange also proposes to make clear that the limitation of five firms qualifying for the MM FAANG Credit applies to the \$5,000 credit.<sup>8</sup>

The Exchange also proposes to add an alternative Credit to the same Market Maker organizations described above. As proposed, any such firm that executes at least 2,000 total monthly contract sides that open a position in FAANG on the Exchange would qualify for a credit of \$10,000; provided, however, that if more than two firms qualify for the proposed (higher) FAANG Credit in a calendar month, the MM FAANG Credit for each qualifying firm would be a pro rata share of \$25,000.<sup>9</sup> As further proposed, a Market Maker firm that qualified

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<sup>7</sup> See proposed Fee Schedule, Section I.A., Options Transaction Fees and Credits, Rates for Options Transactions, note 7 (Options on NYSE FANG+ Index ("FAANG") transactions).

<sup>8</sup> See *id.* In light of the proposed changes, to make the Fee Schedule easier to navigate, the Exchange also proposes to describe each alternative credit in bullet points, with typographical edits to the current rule text for clarity, and to remove reference to "\$5,000" where it appears in the current rule and to add the concept of a "specified minimum number" of "eligible contract sides." See *id.*

<sup>9</sup> See *id.* As with the current Credit, only those FAANG transactions marked as "open" would be eligible to be counted towards the MM FAANG Credit. To add clarity and transparency to the Fee Schedule, the Exchange also proposes to add the word "FAANG"

for both Credits would be eligible for only one of the two alternatives (i.e., the higher). As proposed, the Exchange's maximum exposure under the Credit would continue to be \$50,000, but this cap would be split between the two different qualifying rates.

The Exchange believes the proposed modified MM FAANG Credit would further the Exchange's goal of encouraging trading in this (relatively) new index product, in particular by encouraging Market Makers to provide increased liquidity in tighter markets, which would in turn, benefit all market participants through more opportunities to trade.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>11</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

### The Proposed Rule Change is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in

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prior to the word contracts to make clear that this MM FAANG Credits applies only to such contracts. See id.

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(4) and (5).

promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>12</sup>

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>13</sup> Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in the third quarter of 2019, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>14</sup>

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

While FAANG lists and trades only on the Exchange and NYSE Arca, this index product competes with market participants that choose to create their own synthetic index product by trading in the basket of securities that comprise the FAANG index. This proposed fee change is designed to increase liquidity for market participants that would like to trade FAANG by encouraging Market Maker organizations to open more positions in FAANG on the Exchange.

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<sup>12</sup> See Reg NMS Adopting Release, supra note 4, at 37499.

<sup>13</sup> See supra note 5.

<sup>14</sup> Based on OCC data, see supra note 6, in 2019, the Exchange’s market share in equity-based options declined from 9.82% for the month of January to 7.86% for the month of September.

More specifically, the Exchange believes that the proposed modification to the MM FAANG Credit is designed to generate additional order flow to the Exchange by creating incentives to transact in FAANG, which increased liquidity would benefit all market participants, including non-Market Makers that are interested in trading FAANG. The Exchange believes that the proposed change would incent firms that have historically qualified for the Credit to trade greater volume to earn the higher (proposed) Credit. And, believes that the lower (existing) volume threshold should still attract firms (including those that have never achieved the Credit) to trade the requisite volume in FAANG to earn the Credit. To the extent that the proposed change attracts more FAANG transactions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution, which, in turn, promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system.

To the extent the proposed change continues to attract greater volume and liquidity (to the Floor or otherwise), the Exchange believes the proposed change would improve the Exchange's overall competitiveness and strengthen its market quality for all market participants. In the backdrop of the competitive environment in which the Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to increase the depth of its market and improve trading opportunities to better compete with other exchange offerings.

The Exchange cannot predict with certainty whether any firms would avail themselves of this proposed fee change, as historically, whether or when a firm qualifies for the MM FAANG Credit has varied month to month. Assuming historical behavior can be predictive of future behavior, the Exchange cannot predict the number of firms that may qualify for the alternative



MM FAANG Credit, but believes that firms would be encouraged to take advantage of the modified Credit.

Finally, the Exchange believes that the technical changes to the rule text (i.e., clarifying “FAANG contract sides” and including concept of a specified minimum number of “eligible contract sides”) is reasonable as it would streamline the Fee Schedule, adding clarity and transparency, thereby making the Fee Schedule easier for market participants to navigate.<sup>15</sup>

#### The Proposed Rule Change is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposal is based on the amount and type of business transacted on the Exchange and Market Makers can opt to avail themselves of the MM FAANG Credit or not. To the extent that the proposed change attracts more FAANG transactions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery.

#### The Proposed Rule Change is not Unfairly Discriminatory

The Exchange believes it is not unfairly discriminatory to modify the MM FAANG Credit because the proposed modification would be available to all similarly-situated market participants on an equal and non-discriminatory basis.

The proposal is based on the amount and type of business transacted on the Exchange and Market Maker organizations are not obligated to try to achieve the MM FAANG Credit. In addition, Market Maker organizations have increased obligations with respect to trading on the

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<sup>15</sup> See supra notes 8, 9.

Exchange, and the Exchange believes that making this this Credit available to Market Maker organizations would more likely result in increased liquidity in FAANG on the Exchange. To the extent that the proposed change attracts a variety of transactions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

**B. Self-Regulatory Organization's Statement on Burden on Competition**

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of

individual stocks for all types of orders, large and small.”<sup>16</sup>

*Intramarket Competition.* The proposed change is designed to attract additional order flow to the Exchange by improving quote quality. The Exchange also believes the proposed Credit, as modified, is procompetitive as it would further the Exchange’s goal of introducing (relatively) new products to the marketplace and encouraging Market Makers to provide liquidity in these products, which would in turn, benefit all market participants. Market participants that do not wish to trade in FAANG are not obliged to do so. To the extent that there is an additional competitive burden on market participants that are not eligible for the modified MM FAANG Credit (i.e., non-Market Maker organizations), the Exchange believes that this is appropriate because the proposal would incent Market Makers to transact in FAANG, which would enhance the quality of the Exchange’s markets and increases the volume of contracts traded here. To the extent that this purpose is achieved, all of the Exchange’s market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange. Further, the proposed Credit would be applied to all similarly situated participants (i.e., Market Maker organizations), and, as such, the proposed change would not impose a disparate burden on competition either among or between classes of market participants.

Finally, the Exchange believes that the technical changes to the rule text (i.e., clarifying “FAANG contract sides” and including concept of a specified minimum number of “eligible contract sides”) do not impose an undue burden on competition. Instead, the proposed changes would add clarity and transparency making the Fee Schedule easier for market participants to

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<sup>16</sup> See Reg NMS Adopting Release, supra note 4, at 37499.

navigate.<sup>17</sup>

*Intermarket Competition.* While there is limited intermarket competition with respect to FAANG, as it lists and trades only on the Exchange and NYSE Arca, this index product competes with market participants that choose to create their own synthetic index product by trading in the basket of securities that comprise the FAANG index on other exchanges. This proposed fee change would therefore promote intermarket competition because it is designed to increase liquidity for market participants that would like to trade FAANG by encouraging Market Maker organizations to open more positions in FAANG on the Exchange. The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, by encouraging additional orders to be sent to the Exchange for execution. The Exchange does not believe that the proposed change will impair the ability of any market participants or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>18</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>19</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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<sup>17</sup> See supra notes 8, 9.

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>19</sup> 17 CFR 240.19b-4(f)(2).

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>20</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAMER-2019-57 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAMER-2019-57. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the

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<sup>20</sup> 15 U.S.C. 78s(b)(2)(B).

proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAMER-2019-57, and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**J. Matthew DeLesDernier,**

Assistant Secretary.

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<sup>21</sup> 17 CFR 200.30-3(a)(12).

